IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPEALLATE SIDE JURISDICTION

CRIMINAL APPEAL NO.941 OF 2001

1. Fransis Anthony Fernandis
Age 28 years, Residing at
Room No.7, Namdev Wadi,
Opp. Nitin Company,
Pachpakhadi, Thane.

2. Nilesh Nathuram Sawant
Age 21 years, Room No.B/3,
Saiprasad Apartment, Namdevwadi,
Pachpakhadi, Thane. ..Appellants

Vs.

The State of Maharashtra
(At the instance of
Navpada Police Station,
vide C.R.No.I-604/98
Sessions Case No.324/99) ..Respondents

Mr.K.S.Patil, Advocate for the Appellants.

Mr.A.M.Shringarpure, A.P.P. for the State.

CORAM: V.M.KANADE,J.
DATED: 21ST SEPTEMBER, 2004.

J U D G M E N T.

1. The Appellants are challenging the Judgment and Order passed by the Ad-hoc Additional Sessions Judge,Thane dated 14th September, 2001 passed in Sessions Case No.324 of 1999. The trial Court convicted the Appellants under Section 304 Part I of Indian Penal Code and sentenced to suffer R.I. for seven years.

2. The Appellants along with two others were charged under Sections 147, 302 r.w. 149 and 506

r.w. 149 of Indian Penal Code. The incident in question took place on 29th November, 1998. The prosecution case is that all the accused were armed with dangerous weapons. They first assaulted Simon and there after Arun and inflicted number of incised wounds on both of them. The wife of Arun reached the place and saw that Arun was being assaulted by the accused no.1. She tried to save him. The accused threatened her, inspite of that she tried to shield her husband. The accused there after assaulted her and also gave stab wounds to Arun. Police came to the place of incident, removed Arun to the hospital. Simon was declared dead. Two dying declarations of Arun were recorded and thereafter Arun succumbed to his injuries after couple of weeks. The trial Court convicted Accused nos.1 and 4 under Section 304(I) of the Indian Penal Code, and sentenced them to undergo R.I. for seven years. However, they were acquitted of the other offences with which they were charged.

3. Learned Counsel on behalf of the Appellants has taken me to the oral evidence and dying declarations recorded by the Special Executive Magistrate and also the Judgment and Order of the trial Court. It is submitted that the prosecution had not examined the Special Executive Magistrate who had recorded the dying declarations and even then the said dying declarations were relied upon by

the trial Court. So far as second dying declaration is concerned it is submitted that the Doctor who gave his endorsement on the said dying declaration was not examined by the Prosecution. It is further submitted that the dying declaration did not establish the identity of the assailants and their full names and addresses were not known. He further submitted that the statement of P.W.8 that there was no sufficient light in the night was not taken into consideration while appreciating the eye witnesses's evidence. It is further submitted that the wife of deceased Arun P.W.1 had not witnessed the entire incident and had reached the place of incident practically when the entire assault was over. It is further submitted that the trial Court erred in appreciating the evidence of P.W.4 that he had not told the police that he had personally seen the Appellants assaulting Arun. There after the learned Counsel stated regarding the prosecution evidence of recovery. It is stated that the recovery of weapons was made after 2, 3 years and it is difficult to imagine that they would identify the weapon after a long lapse of time.

4. Learned A.P.P. on behalf of the State vehemently opposed the said submissions. He submitted that the prosecution has proved beyond reasonable doubt that the accused had assaulted the deceased and this was proved by examining various

witnesses. He submitted that the prosecution adduced evidence in the form of eye witness which was corroborated by dying declaration and further it was corroborated by Medical evidence on record. The wife of the deceased P.W.1 had survived the assault she was also injured and she had identified the accused. He submitted that therefore, the conviction should be confirmed and appeal should be dismissed.

5. In the present case the prosecution has examined three witnesses. P.W.1 Hemangi wife of deceased Arun. Sulochana P.W.3 and Baban P.W.5. The Prosecution has further relied on the recovery panchanama which has been proved through P.W.5 and P.W.6. The dying declarations are also brought on record. P.W.1 Hemangi has stated in her evidence that she stays at Thane along with her husband and other members of her family. She stated that her husband was working in the Raymonds Company. On 29th November, 1998 she was inside her house along with her inlaws, her children were playing outside the house, at that time her children informed her that her husband was being assaulted. She therefore, rushed out of the house and saw her husband Arun was lying in an injured state. She further stated that Simon was also lying close to her husband and 6, 7 persons were assaulting him with knives. When she raised shouts to save her

husband the Appellants rushed towards her with knives and they gave her fists and kick blows and asked her to leave the place or else they would kill her. She has also stated that the Appellants assaulted her husband on his back with knives. Thereafter, her inlaws came to the place. Her husband Arun and Simon were taken to the Civil Hospital, there Simon was declared dead. Her husband was admitted in the hospital for about twenty-four days and there after he died. She has stated that her saree was seized by police. She had identified the Article No.23 which was in the hands of Fransis and Article No.19 which was in the hands of Nilesh. Inspite of searching cross examination taken by the accused she has stuck to her evidence. Though suggestions were made to her that her husband along with deceased Simon were involved in number of criminal cases.

. From the evidence of P.W.1 the Prosecution has proved the assault by the Appellants on deceased Arun. Though P.W.1 has not seen the assault on Simon she has stated that his body was lying close to Arun and that both the Appellants had assaulted Arun with knives on his back. Her evidence has not been shaken in cross examination. The other eye witnesses corroborated her testimony.

6. P.W.3 Sulochana has stated that her sister

Taramati came and told her that her husband was assaulted, she therefore, went to the site of the incident and there she noticed the Appellants with knives in their hands. She saw that Nilesh and Francis were assaulting one person on his back namely Simon. There after she saw that the Appellants assaulted Arun with the knives. Her evidence also is not shaken in the cross examination. She has therefore, corroborated the evidence of P.W.1. Similarly P.W.4 also has stated that he has seen the Appellants assaulting Arun with knives. He has identified the Articles 19 and 23 which were the knives used by the accused. The Prosecution has further proved the recovery of the knives through P.W. 5 and P.W. 6. Along with this evidence there is evidence of two dying declarations recorded by the Special Executive Magistrate.

7. The learned Counsel appearing on behalf of the Appellants has taken strong objection to the dying declarations taken on record especially when the Special Executive Magistrate who recorded the dying declarations was not examined.

8. In my view even assuming for a moment that the said dying declarations are not brought in evidence, even then the testimony of the three witnesses supported by the testimony of recovery and medical evidence clearly establish that the

Appellants have assaulted the deceased. The finding given by the trial Court therefore, in my view will have to be confirmed. The conviction and sentence awarded by the trial Court is therefore, confirmed. The Appeal is dismissed.

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